

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

To be argued by
William B. Gray

Docket No.

77-2122

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CALVIN RONALD DeVYVER

Petitioner-Appellant

v.

UNITED STATES OF AMERICA

Respondent-Appellee

Appeal from the United States District
Court for the District of Vermont

BRIEF FOR THE UNITED STATES



WILLIAM B. GRAY
United States Attorney

JOHN R. HUGHES, JR.
Assistant U.S. Attorney

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PRELIMINARY STATEMENT

Calvin R. DeVyver appeals from the order dated September 6, 1977, entered by the Honorable James S. Holden, Chief Judge of the United States District Court for the District of Vermont, denying his motion pursuant to 28 U.S.C. § 2255 to vacate and set aside the conviction and judgment.

STATEMENT OF ISSUES

- I WHETHER DeVYVER'S BELATED CLAIM THAT A PLEA AGREEMENT WAS BREACHED MAY BE RAISED FOR THE FIRST TIME IN A § 2255 PETITION.
2. WHETHER THE DISTRICT COURT PROPERLY FOUND THAT DeVYVER'S PETITION WAS FRIVOLOUS, AND THAT NO BREACH OF A PLEA AGREEMENT HAD OCCURRED.

STATEMENT OF FACTS

A. PRIOR PROCEEDINGS

An indictment bearing criminal number 6850 was filed on November 13, 1972, charging Calvin R. DeVyver in five counts with violations of the Gun Control Act of 1968.

Count I charged him with using false identification to purchase ammunition in violation of 18 U.S.C. § 922(a)(6) and Counts II through V charged him with using false identification to purchase firearms, in violation of 18 U.S.C. § 922(a)(6).

On March 27, 1973 DeVyver pleaded guilty to Count I of the indictment. On August 3, 1973, DeVyver was sentenced by Honorable Albert W. Coffrin, United States District Judge to a term of imprisonment of five years for a study by the Bureau of Prisons under 18 U.S.C. § 4208(b). Upon completion of that study, on December 10, 1973, DeVyver was sentenced to three years and six months imprisonment with credit for time served. DeVyver was released on parole on March 24, 1975, after service of twenty months of his prison term.

On July 28, 1975, DeVyver moved to vacate and set

aside his conviction and judgment, and this motion was granted* by Judge Coffrin on January 6, 1976. On the same day, DeVyver pleaded not guilty to Count I of the indictment and the Government's motion to reinstate Counts II through V of the indictment was granted. DeVyver's motion to prohibit the reinstatement of Counts II - V was denied on February 3, 1976. DeVyver appealed the Court's February 3, 1976, order of reinstatement on March 5, 1976, and voluntarily dismissed the appeal on March 12, 1976.

On March 15, 1976, DeVyver pleaded guilty to Count I of the indictment before Honorable James S. Holden, Chief United States District Judge. On May 7, 1976, Judge Holden sentenced DeVyver to imprisonment for forty-two months, suspended execution of sentence and placed him on probation for a period of two years.

On June 28, 1976, DeVyver filed a motion to correct the sentence imposed by Judge Holden. This motion was denied on October 27, 1976 and DeVyver filed an untimely notice of appeal of this denial on December 13, 1976 along with a motion to extend the time for filing an appeal. On December 27, 1976, Judge Holden denied DeVyver's motion to

* Although the motion alleged a number of unspecific infirmities in the conviction and judgment, it appears that Judge Coffrin was concerned solely with the adequacy of allocution under Rule 11, Federal Rules of Criminal Procedure.

extend the time of filing the notice of appeal.

On July 13, 1977, more than fourteen months after the judgment and conviction entered on May 7, 1976, DeVyver moved to vacate and set aside this judgment and conviction and raised for the first time the claim that the Government had breached the plea agreement. The motion was denied on September 6, 1977. On September 20, 1977, DeVyver filed this present appeal from the denial.

DeVyver has been represented throughout all the proceedings by his present attorney, Robert Edwards West, Esq., who was assigned by the District Court on November 13, 1972.

B. THE PLEA OF GUILTY AND SENTENCING

Following the withdrawal of the original plea of guilty and the reinstatement of Counts II through V of the indictment, DeVyver's attorney, Mr. West, and the Assistant United States Attorney handling the case, John R. Hughes, Jr., entered into a plea agreement. The District Court found, based upon the transcripts of the plea and the affidavit* of Mr. Hughes, (A. 36)** that the plea agreement "involved an exchange of petitioner's guilty plea to Count I of the indictment for an agreement by the Government to dismiss Counts II - V at the time of sentencing and to make no remarks or recommendations to the Court concerning the sentence to be imposed." (A. 45) (emphasis supplied.)

* Mr. West did not file an affidavit and has never stated under oath that the agreement was not as stated by Mr. Hughes and found by the Court.

** "A" refers to the Appellant's Appendix. In the copy served on the Government, the pages were not numbered but in the Government's brief numerical references are given to pages as though they bore sequential numbers.

The District Court was also undoubtedly aware that in so agreeing Mr. Hughes was following the practice of the United States Attorneys' Office for the District of Vermont which does not make recommendations as to a specific sentence. Mr. Hughes has never made it part of a plea agreement that he would make no remarks about the facts of the case at the time of sentence. (A. 37)

Significantly, at the entry of the plea, Mr. West stated his understanding of the plea agreement was that the United States Attorney would make no statements regarding sentence. (A. 11) (emphasis supplied.) Mr. Hughes, while concurring that Mr. West had correctly stated the agreement, inadvertently misstated it himself by picking up DeVyver's own misstatement (A. 10) and saying "we will make no statements at the time of sentence." (A. 11) (emphasis supplied.)

DeVyver, a resident of New York City who was prohibited by statute from buying guns or ammunition in another state, pleaded guilty to using a fictitious name, a fictitious Vermont residence and false resident's fishing license in order to purchase four boxes of handgun ammunition.

On May 7, 1976, speaking on behalf of DeVyver at sentencing, Mr. West characterized this offense as "not of serious nature. . . simply a really minor property offense. . ." and an incidental result of having purchased

a false resident fishing license solely because it is less expensive than a non-resident license. (A. 18)

The Government was represented* by then United States Attorney George W.F. Cook who was aware that the indictment originally charged, in addition to the ammunition purchase, four similar fraudulent purchases of four different handguns, from four different gun stores using at least one other fictitious name and false resident fishing license. When the District Court asked the United States Attorney to comment it appears that Mr. West spoke off the record to Mr. Cook. (A. 19)

Mr. Cook, apparently surprised by Mr. West's representations to him and in an effort to clarify the agreement, stated:

Mr. WEST has told me, I would have said something briefly but Mr. WEST has told me that he had a plea bargain with Mr. HUGHES who handled this case at the time of the plea that the Government would not say anything at sentencing. Usually, our usual - I'd like to be sure that I am right, Mr. West, usually, if we get into this position at all we make the agreement that we do not make any recommendations in sentencing but we do not usually agree we will not say anything. Am I correct? (A. 19)

Mr. West agreed with Mr. Cook's statement of the Government's usual practice and stated:

"That's correct, but it is on the record." (A. 19)

* Mr. Hughes was engaged in trial of United States v. Holden, et al, Cr. No. 75-73 before Judge Coffrin in Brattleboro, Vermont.

The Court nevertheless indicated the wish to hear from the United States Attorney and Mr. Cool made the following brief statement in response to Mr. West's characterization of the offense:

The only thing I wish to say, the Government does consider this a serious matter and it is a part of a serious episode. We have no recommendation, Your Honor, but we did consider this a serious case, much more serious than Mr. WEST has represented. (A. 19)

No objection was made to the statement.

The Court then imposed a suspended sentence of 42 months and placed DeVyver on probation for two years.

(A. 20)

ARGUMENT

I

DeVYVER'S BELATED CLAIM THAT A PLEA AGREEMENT WAS BREACHED MAY NOT BE RAISED FOR THE FIRST TIME BY A § 2255 PETITION.

Fourteen months after the sentencing to which he now objects, nine months after the District Court denied his previous motion challenging the legality of the sentence imposed, and fourteen months after the Government had dismissed the remaining four counts in which he was charged, Calvin DeVyver filed a § 2255 petition claiming for the first time that his plea was involuntary because the Government, at the time of his sentencing, breached the plea agreement. This Court recently stated in United States v. Wright, 524 F.2d 1100, 1101-1102 (2d Cir. 1975), that 28 U.S.C. § 2255 is unavailable for such claim:

Not every error of law may be successfully asserted in proceedings under this section; the error must be a fundamental one which inherently results in a complete miscarriage of justice. Davis v. United States, 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed. 2d 109 (1974). Furthermore, where constitutional issues are absent, a defendant who fails to request relief patently available to him on the trial or through regular avenues of appeal may be precluded from subsequently securing it through collateral means. Sunal v. Large, 332 U.S. 174, 178, 67 S.Ct. 1588, 91 L.Ed. 1982 (1947); United States v. West, 494 F.2d 1314 (2d Cir.), cert. denied, 419 U.S. 899, 95 S.Ct. 180, 42 L.Ed. 2d 144 (1974).

Assuming that DeVyver's claim of breach was well founded, there is no suggestion in Santobello v. New York, 404 U.S. 257, 259 (1971), relied on by DeVyver, that such claim is of constitutional magnitude, thus obviating the requirement that regular avenues of relief be pursued.

DeVyver was in possession of all facts necessary to make a focused objection to the District Court at the time of sentencing and, perhaps as a matter of conscious strategy, failed to do so. This Court has held that such a "deliberate by-passing" at the District Court level when the error can still be corrected, renders § 2255 unavailable for a belated collateral attack. United States v. West, supra, 494 F.2d at 1315.

In Drake v. United States, 439 F.2d 1319, 1321 (6th Cir. 1971), the Court stated: "Petitioner alleged a bargain, but the words of the transcript (of the plea and sentencing) clearly show that he was on notice, at a time when he could have withdrawn his plea, that the Government was not acting in accordance with the claimed bargain." The Court held that defendant had an obligation to voice his objection before imposition of sentence when the provisions of Rule 32(d), Federal Rules of Criminal Procedure, gave the Court greater discretion in permitting withdrawal of the guilty plea.

Similarly, DeVyver had an obligation to focus

the objection at the sentencing so that the Court could take corrective action such as permitting withdrawal of the plea or assignment to another Judge for sentencing. Instead, DeVyver's counsel chose to accept the Court's suspended sentence and the dismissal of the four remaining open counts which were part of the plea bargain with the Government. His belated request for relief fourteen months later in a petition under 28 U.S.C. § 2255 should be denied as untimely and because the issue was not properly preserved in the District Court or raised on direct appeal.

II

THE DISTRICT COURT PROPERLY FOUND THAT DeVYVER'S PETITION WAS FRIVOLOUS, AND THAT NO BREACH OF A PLEA AGREEMENT HAD OCCURRED.

The District Court characterized this petition as a "frivolous attempt to semanticize the use of the word statement to erase the consequences of a valid plea."

(A. 45) The District Court also found that there was no breach of a plea agreement and that no objection was made at the time of sentencing. (A. 44, 45) In so doing, the District Court had before it the affidavit of the Assistant United States Attorney, no affidavit from DeVyver's counsel, and the transcripts of the proceedings. The District Court also was in a position to recall the incident, know the lawyers involved and be familiar with the usual plea agreement practices of the District. Under such circumstances, the findings of the District Court should be affirmed.

Contrary to DeVyver's contention, this is not a case in which the Government failed to meet "the burden of 'letting the left hand know what the right hand is doing' or has done," Santobello v. New York, supra, 404 U.S. 262. Mr. Hughes and Mr. Cook were in agreement as to the Government's position at sentencing. (A. 19, 36)

If DeVyver and his attorney actually believed that the Government would remain mute at sentencing, in the face of inquiry by the District Court, it was a result of an honest misunderstanding between counsel, not careless error by the Government.

The consequences of that misunderstanding, if any, were insignificant. DeVyver's counsel had spoken at length to minimize the crime to a degree that strained common sense and the record. The United States Attorney's response was brief, moderate and contained no recommendation as to sentence. Mr. Cook sought to rebut any inference that the Government did not consider it a serious case.

The District Court found:

If it can be said that the letter of the bargain was exceeded, the spirit was preserved. Moreover, the remark by the United States Attorney was, at most, a response to defense counsel's palliation of the offense charged and there was no such breach here. It had no bearing on the sentence imposed. Probation was indicated by force of the fact that the defendant had already served an extended period of confinement on the sentence originally imposed by Judge Coffrin. (A. 45) (Footnote omitted.)

Clearly, the District Court had already determined to impose the same sentence imposed previously by Judge Coffrin, but to suspend execution thereof because DeVyver had already served 20 months and been released on parole.

The District Court's finding that DeVyver's petition is frivolous should be affirmed.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

WILLIAM B. GRAY
United States Attorney for
the District of Vermont
Attorney for the United
States of America

JOHN R. HUGHES, JR.
Assistant U.S. Attorney

November 30, 1977

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CALVIN RONALD DeVYVER

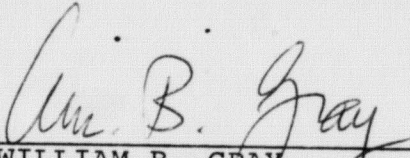
v.

Docket No. 77-2122

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE .

I hereby certify that I have this 30th day of November, 1977, mailed two copies of the attached Brief to Robert E. West, Esq., counsel for Petitioner-Appellant, postage prepaid, 26 Williams Street, Rutland, Vermont 05701.



WILLIAM B. GRAY
United States Attorney

United States Department of Justice

UNITED STATES ATTORNEY

DISTRICT OF VERMONT
RUTLAND, VERMONT 05701

November 30, 1977

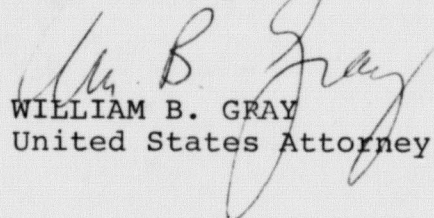
A. Daniel Fusaro, Clerk
U.S. Court of Appeals
1702 U.S. Courthouse
Foley Square
New York, New York 10007

Re: United States v. DeVyver
Docket NO. 77-2122

Dear Mr. Fusaro:

Enclosed for filing in the above-captioned case are ten copies of the Government's Brief. Also enclosed find a Certificate of Service on Robert E. West, Esq., counsel for the Petitioner-Appellant.

Very truly yours,


WILLIAM B. GRAY
United States Attorney

WBG:lm
Enclosure
cc: Robert E. West, Esq.

